

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 81-1839

**TITLE** MINNEAPOLIS STAR AND TRIBUNE COMPANY, Appellant  
v.

**PLACE** MINNESOTA COMMISSIONER OF REVENUE  
Washington, D. C.

**DATE** January 12, 1983

**PAGES** 1 thru 51

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MINNEAPOLIS STAR AND                   :

4   TRIBUNE COMPANY,                   :

5                                   Appellant                   :

6                   v.                   :           No. 81-1839

7   MINNESOTA COMMISSIONER OF REVENUE   :

8   - - - - -x

9                                   Washington, D.C.

10                                   Wednesday, January 12, 1983

11       The above-entitled matter came on for oral argument  
12 before the Supreme Court of the United States at  
13 11:04/a.m.

14   APPEARANCES:

15   LAWRENCE C. BROWN, ESQ., Minneapolis, Minnesota;  
16       on behalf of the Appellant.

17   PAUL R. KEMPAINEN, ESQ., Special Assistant Attorney  
18 General of Minnesota, St. Paul, Minnesota;  
19       on behalf of the Appellant.

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1                                P R O C E E D I N G S

2                        CHIEF JUSTICE BURGER: Mr. Brown, I think you  
3 may proceed when you are ready.

4                        ORAL ARGUMENT OF LAWRENCE C. BROWN, ESQ.,

5                                ON BEHALF OF THE APPELLANT

6                        MR. BROWN: Mr. Chief Justice and Justices of  
7 this Honorable Court:

8                        The Appellant before you is Minneapolis Star  
9 and Tribune Company, locally known in Minnesota as Star  
10 and Tribune. It is the largest circulation daily  
11 newspaper in the State of Minnesota.

12                       This appeal presents two levels of issues  
13 which are essentially press clause First Amendment  
14 issues. The first issue, as we view it, is whether the  
15 State of Minnesota may tax publishers of Minnesota  
16 newspapers by imposing a tax on their consumption of  
17 paper and ink, or whether such a form of tax is  
18 prohibited by the press clause of the First Amendment in  
19 this Court's 1936 decision in the Grosjean case.

20                       Our view of that basic issue is that it is  
21 extremely narrow, it is essentially a revisiting of this  
22 Court's decision in Grosjean, and that the tax we  
23 challenge in terms of constitutional magnitude is  
24 factually indistinguishable from the stamp taxes in  
25 England and the colonies of Massachusetts and New York

1 imposed during the 1700s.

2           The second issue that we present assumes that  
3 we have lost on the first issue. The second issue is if  
4 such a use tax on paper and ink may constitutionally be  
5 imposed on the business of publishing newspapers, then  
6 is it still constitutional when the state of Minnesota,  
7 by enacting an annual \$100,000 exemption which has the  
8 effect of imposing the tax only on approximately a dozen  
9 or so of Minnesota's large circulation daily newspapers  
10 and also has the effect of removing from the burden of  
11 the tax approximately 370 to 380 of Minnesota's other  
12 newspapers who simply do not consume on an annual basis  
13 \$100,000 worth of paper and ink?

14           The background of the tax may be summarized  
15 briefly. In 1967, Minnesota for the first time adopted  
16 a sales and use tax program. In 1971, through an  
17 exemption, the use tax here at issue was, for the first  
18 time, visited upon all Minnesota newspapers. And from  
19 1971 until January 1 of 1974, all newspapers in  
20 Minnesota who consumed paper and ink, and by definition  
21 since paper and ink are the only two physical components  
22 of a newspaper, they all did, they were all, therefore,  
23 subjected to the tax at issue.

24           On January 1, 1974, by virtue of the annual  
25 \$100,000 exemption and thereafter, during the timeframe

1 that is at issue here, January 1, 1974 through May of  
2 1975, which is the refund period for which this action  
3 was commenced in the Hennepin County District Court in  
4 Minneapolis, Minnesota, the only papers in Minnesota who  
5 paid the tax were the large circulation dailies. And  
6 the Minneapolis Star and Tribune --

7 QUESTION: Mr. Brown, when you say the large  
8 circulation dailies, how many of those did that cover  
9 within the state?

10 MR. BROWN: Your Honor, according to the  
11 records submitted in support of Star Tribune's summary  
12 judgment motion, I think there were approximately 29 and  
13 27. I may be off a little bit in the numbers.

14 QUESTION: What was the approximate  
15 circulation of the newspaper with the least circulation  
16 which nonetheless was subject to the tax?

17 CHIEF JUSTICE BURGER: I think the Brainard  
18 Dispatch, Your Honor, is the one which in 1974 was not  
19 subject to the tax and in 1975 was, and it was at about  
20 14 to 15 thousand a year. Now, I may have those years  
21 backwards, but that's about the cutoff.

22 The procedural background in this case was  
23 that the action for the refund of approximately \$875,000  
24 of use taxes paid, was commenced in August of 1975. We  
25 are dealing here with a 17-month timeframe which is the

1 defined period for which we sued to obtain a refund.

2           We proceeded to move the trial court for  
3 summary judgment, and in support of our motion we  
4 submitted a fact record consisting of affidavit  
5 testimony. There was also, as one of our fact showings,  
6 an affidavit from Mr. Shaw who ran the Minnesota  
7 Newspaper Publishers Association which sets forth the  
8 statistical basis identifying Minnesota legal newspapers  
9 and the relative circulations of those newspapers who do  
10 pay the tax, and the Minnesota Supreme Court has set  
11 forth in its formal opinion in this case the statistical  
12 data defining who was publishing newspapers and who was  
13 subjected to the tax.

14           The trial court granted summary judgment for  
15 Star Tribune on all constitutional issues presented. At  
16 the oral argument before the trial court, the state  
17 orally moved for summary judgment on the basis of the  
18 fact records submitted by Star and Tribune. And I pause  
19 to note that point, because we are here before this  
20 Court challenging the judgment of the Minnesota Supreme  
21 Court which reversed the trial court, with the same  
22 identical fact record that we had at the trial court.  
23 And that was a fact record which the state adopted as  
24 its own in support of its motion for summary judgment.

25           The state has never submitted any factual

1 showing that would in any way indicate that the factual  
2 record submitted by Star Tribune was not a thorough and  
3 accurate record on which this case may be adjudicated.

4 QUESTION: What's the law --

5 QUESTION: -- tax that applied to all  
6 consumers, all the newspapers in the state, no exemption  
7 on the 100,000.

8 MR. BROWN: And the point being taxed, Mr.  
9 Chief Justice, is the use or consumption of paper and  
10 ink. We challenged the constitutionality of that under  
11 the First Amendment and under a combined First Amendment  
12 equal protection strict scrutiny standard of review.

13 QUESTION: Could I change that a little bit?  
14 Suppose you had a general sales tax to which newspapers  
15 were subject? Would you be here or would you challenge  
16 that tax?

17 MR. BROWN: We would, Mr. Justice Blackmun,  
18 but let me say that we would --

19 QUESTION: You would or would not?

20 MR. BROWN: We would, sir, but we would do so  
21 first, with the acknowledgement that in no way does Star  
22 and Tribune challenge the power of the state of  
23 Minnesota or any other state in the exercise of its  
24 broad general revenue-raising tax powers, to impose  
25 broad forms of taxation equally and non-discriminatorily

1 on all businesses which are fairly classified together  
2 with one caveat, and that is that if there is anything  
3 left of Murdock and Follett, we believe that broad form,  
4 non-discriminatory taxes as applied in certain First  
5 Amendment activity may be unconstitutional because as  
6 applied, they improperly burden the exercise of First  
7 Amendment activity.

8 QUESTION: Could that be rephrased to say the  
9 Star Tribune has no objection to the state of Minnesota  
10 taxing any business except the newspaper business?

11 MR. BROWN: I don't think so, Your Honor. I  
12 think that's over-statement because the record that we  
13 submitted to the trial court and that's before this  
14 Court affirmatively establishes that Star Tribune pays  
15 income taxes, real property taxes, payroll taxes, all  
16 business taxes of broad form.

17 QUESTION: I imagine 3M does the same. 3M, if  
18 it sells at retail probably has to pay a sales tax.

19 MR. BROWN: That's correct, Your Honor. The  
20 distinction is that Star Tribune has First Amendment  
21 rights under the Press Clause, but 3M does not.

22 QUESTION: Mr. Brown, back in the days of the  
23 liner type, could Minnesota tax all users of lead?

24 MR. BROWN: Of lead. Your Honor, --

25 QUESTION: This is back when you had liner

1 type. Ancient history.

2 MR. BROWN: Well, not all that ancient. Your  
3 Honor, I think that that type of tax generally  
4 applicable to the consumption of lead as it applies to  
5 the newspaper business probably would have been  
6 constitutional because I can find nowhere in the stamp  
7 tax cases in the 1700s in England or in this country,  
8 direct historical reference points for taxes on  
9 knowledge which were imposed on the consumption of lead.

10 QUESTION: It would be like a payroll tax.

11 MR. BROWN: I don't think it would be like a  
12 payroll tax as applied to the business of publishing a  
13 newspaper, Your Honor.

14 QUESTION: Did I understand your response to  
15 mean that only newspapers have First Amendment rights?

16 MR. BROWN: No, Your Honor, I don't mean to  
17 suggest that at all.

18 CHIEF JUSTICE BURGER: Well, you suggested  
19 that 3M didn't have any First Amendment rights.

20 MR. BROWN: 3M does have First Amendment  
21 rights when it exercises speech, but 3M's products -- I  
22 thought Mr. Justice Rehnquist was saying if they were  
23 taxed, wouldn't they be identical to the tax on paper  
24 and ink here at issue. And my point is that the tax on  
25 paper and ink here at issue is a tax imposed on the

1 consumption of those two commodities by newspapers. And  
2 in that context, I don't think 3M has a Press Clause  
3 First Amendment right. I think Star Tribune clearly  
4 does.

5 QUESTION: Now, would you apply that to  
6 Minnesota Mining's advertising? I suspect -- in fact I  
7 know they have a tremendous volume of paper going out --  
8 paper with ink used to print the message. Is that First  
9 Amendment protection?

10 MR. BROWN: Your Honor, dealing with the tax  
11 here at issue, the statutory phrase that is pivotal is  
12 the phrase "publications." That's the way the Minnesota  
13 legislature chose to classify it. Our proof here  
14 endeavored to demonstrate that that tax is only paid by  
15 Minnesota newspapers, and by virtue of the \$100,000  
16 annual exemption, only large circulation Minnesota  
17 newspapers.

18 In the case of 3M, I've got to believe, Mr.  
19 Chief Justice, that if 3M had ever been subjected to  
20 Minnesota's use tax on paper and ink, that fact would  
21 appear here in this record because it was in the  
22 self-interest of the state in meeting our arguments to  
23 prove that kind of fact. There are no such facts in  
24 this record.

25 The only facts in this record are that the tax

1    which the legislature imposed on publications is, in  
2    fact, only, during the period of time at issue, a  
3    newspaper tax.

4                QUESTION: This tax would apply to a textbook  
5    manufacturer, too, would it not?

6                MR. BROWN: No. Textbook --

7                QUESTION: How about the West Publishing  
8    Company?

9                MR. BROWN: I think their products, Your  
10   Honor, wind up being taxed on the sales at retail. You  
11   see, you have exempt publications under the dichotomy of  
12   the sales and the use tax scheme that Minnesota has  
13   established.

14               QUESTION: Well, West Publishing Company must  
15   use almost as much ink and pulp as most of the  
16   newspapers, don't they?

17               MR. BROWN: Substantial, Your Honor. Clearly,  
18   they do and yet, they do not -- they are not, by  
19   statute, subjected to the use tax because they don't  
20   meet the statutory definition of "publication."

21               QUESTION: Well, the case was judged in the  
22   Minnesota Supreme Court on the basis -- was upheld on  
23   the basis that it just applied to newspapers.

24               MR. BROWN: The Minnesota Supreme Court --

25               QUESTION: And only certain newspapers.

1           MR. BROWN: That's what they did, Judge. And  
2 they accepted -- the Minnesota Supreme Court accepted  
3 our proof that this is a newspaper tax --

4           QUESTION: Well, that's the construction given  
5 of this statute by the Minnesota Supreme Court.

6           MR. BROWN: That seems to be what they tell  
7 us. And they tell us, nonetheless, it does not violate  
8 the constitutional protections of the First Amendment  
9 under the Press Clause.

10           They also tell us that because -- and this is  
11 a very telling point to at least me -- they say because  
12 one of the purposes of the statute is to raise revenue,  
13 that in itself insulates it from the constitutional  
14 challenge that we present.

15           Well, all the stamp taxes in England were  
16 enacted to raise revenues. The stamp tax of 1712 was  
17 imposed on various articles of commerce including the  
18 paper that printers had to buy to lawfully communicate  
19 with their readers.

20           QUESTION: Mr. Brown, would you hazard a guess  
21 as to why the Minnesota legislature imposed the \$100,000  
22 exemption?

23           MR. BROWN: Your Honor, any guess I would  
24 hazard would go beyond the record of this case. For as  
25 we point out in our brief, there is no legislative

1 history that the Minnesota legislature sought to create  
2 to explain why it did what it did when it did it.

3 In terms of my speculation, I would only  
4 invite the Court to look to the effect of the tax. We  
5 have established, we believe, that the effect of the tax  
6 is to tax only newspapers, and the effect of the  
7 \$100,000 exemption is to limit the impact of the tax on  
8 only a dozen or so of Minnesota's largest circulation  
9 newspapers.

10 QUESTION: And 95 percent of it on two.

11 MR. BROWN: That's correct, Your Honor, the  
12 Minneapolis and St. Paul newspapers.

13 QUESTION: With respect to the Brainard and  
14 the Austin and the Mankato papers that apparently are  
15 also subject to the tax, would you say that they are a  
16 homogeneous class, if one can speak in those terms, with  
17 the Minneapolis and St. Paul dailies?

18 MR. BROWN: I wouldn't call them homogeneous;  
19 I would call them competitors, because the circulation  
20 of the Twin Cities newspapers of Minneapolis and St.  
21 Paul extends throughout the state of Minnesota and into  
22 adjoining states. They are homogeneous, Your Honor, in  
23 that they are all newspapers. They are homogenous in  
24 that they are all in the business of publishing  
25 newspapers, and to the extent their circulation levels

1 are sufficient to consume enough paper and ink to exceed  
2 the annual exemption, they are homogenous in that they  
3 all have to pay some amount of tax.

4 QUESTION: But then I take it that you're not  
5 suggesting that there was anything other than an  
6 economic or tax-oriented, tax policy-oriented reason for  
7 the \$100,000 cutoff. Because a lot of other newspapers  
8 that wouldn't pay under the \$100,000 cutoff also are  
9 published dailies, they consume newsprint and that sort  
10 of thing.

11 MR. BROWN: I'm afraid I can't go that far.  
12 Perhaps my experience in 20 plus years of practicing in  
13 Minnesota, watching the Minnesota political scene and  
14 appearing before my home court states courts has tended  
15 to make me a little more suspicious than that, Your  
16 Honor. And my suspicion, it would seem on the record of  
17 this case, is confirmed.

18 Most of us in common daily life are judged by  
19 the consequences of the acts that we perform, and that's  
20 really the standard that we'd seek to have this court  
21 apply to the judgment of the Minnesota Supreme Court  
22 that this is a constitutional tax. It isn't.

23 QUESTION: Is it a realistic proposition that  
24 a substantial majority of the Minnesota legislature have  
25 of the local newspapers that are not subject to this tax?

1           MR. BROWN: That's clearly the case with the  
2 makeup of the Minnesota legislative bodies, the Senate  
3 and the House, Your Honor. However, I don't want my  
4 comments to the questions that have been put to me to be  
5 interpreted that I think, or that Star Tribune thinks,  
6 that legislative motive or intent is critical to a First  
7 Amendment analysis of the tax here at issue.

8           We have taken the position in our brief, and  
9 we stand by it, that the illicit or bad legislative  
10 intent is not the basis for the holding in Grosjean.

11          QUESTION: Well, of course, there are  
12 decisions that have so interpreted Grosjean, are there  
13 not?

14          MR. BROWN: You're absolutely correct, Justice  
15 O'Connor, and to that extent I believe those lower court  
16 decisions have misinterpreted Grosjean.

17          If I may give you two reference points from  
18 the transcript in Grosjean, and I think we only need  
19 two, there is no doubt that the parties in Grosjean knew  
20 what they were fighting about.

21          At page 45 of Louisiana's brief after  
22 discussing at some length various forms of taxes of  
23 general application which in the brief they say, we  
24 could have enacted those kinds of statutes and had a  
25 lawful test. They said, the tax levied by the Louisiana

1 legislature is not such a tax; the legislature could  
2 have levied such a tax but it did not do so. Instead,  
3 it imposed the tax on the business of selling or making  
4 any charge for advertising or for advertisements.

5           So the position of Louisiana was we have the  
6 power to impose that form of tax on the business of  
7 publishing a newspaper. At page 30 of the appellee's  
8 brief in that case, the counter-point is presented.  
9 These appellees are not discussing the burden of the  
10 particular tax; rather, they assert that the legislature  
11 does not have the power to levy a tax on their business  
12 such as it has levied.

13           I believe that the holding in the Grosjean  
14 case is simply and narrowly that there are certain forms  
15 of taxes which legislatures of the various states are  
16 prohibited from enacting. Very narrow forms such as the  
17 taxes on knowledge which seek to impose direct taxes on  
18 circulation revenues, on advertising revenues or on the  
19 consumption of paper.

20           QUESTION: Mr. Brown, I take it, then, that  
21 you adhere to what I think is your position that if the  
22 Minnesota legislature sits down and says 50 percent of  
23 our gross revenues are raised by sales/use tax  
24 combinations on people in business to make money, and  
25 we're looking at the present structure and we see

1 there's a sales tax on almost every business entity in  
2 the state. Most of the ones that we can't hit with a  
3 sales tax we hit with a use tax. Traditionally, it's  
4 been very tough to collect a sales tax on newspapers  
5 because so many of them are sold from boxes or by  
6 carrier boys, and we think newspapers should furnish  
7 their fair share of sales tax revenue to the state, so  
8 we're going to tax them with a use tax on ink and paper,  
9 which is going to turn out to be less payment by them  
10 than if we tried to tax their retail sales of newspapers.

11           You say that's prohibited by the First  
12 Amendment?

13           MR. BROWN: We do, Your Honor. But we say so  
14 in perhaps a better context than I think was your  
15 question, because the way you phrased your question it  
16 left me with the impression that you feel that if the  
17 state of Minnesota lacks the power to impose this form  
18 of tax, somehow the large papers in Minnesota are going  
19 to get away with something.

20           And if that is Your Honor's impression, I  
21 would urge you to go back over the historical references  
22 that we have cited, because taxes on paper, Mr. Justice  
23 Rehnquist, were one of the three pressure points by  
24 which the newspapers in England were regulated through  
25 the direct taxing power.

1 QUESTION: But were those taxes on paper in  
2 England part of a scheme whereby sales and use of  
3 implements and products were generally taxed?

4 MR. BROWN: They were not, Your Honor, because  
5 --

6 QUESTION: Well, isn't that quite a difference?

7 MR. BROWN: Not really because prior to 1791  
8 there were no sales or use taxes. Sales and use taxes  
9 are relatively new; they're Depression taxes.

10 QUESTION: Well, true. But I think one could  
11 read the First Amendment to feel that if you simply  
12 singled out newspapers and taxed them and didn't tax 3M  
13 for its sales, or any other Minnesota commercial entity  
14 for its sales, you would have a real First Amendment  
15 problem.

16 But if the newspaper as a commercial entity is  
17 simply being made to pay a fair share of the use tax  
18 load in the state, everyone's entitled to their own  
19 opinion about what the First Amendment says, but I think  
20 those are two different cases.

21 MR. BROWN: Your Honor, my response, if you  
22 had a question within your response to my --

23 QUESTION: Well, it was something of a  
24 rhetorical question.

25 MR. BROWN: My response nonetheless would be

1 this. We thought we demonstrated through our factual  
2 proof at the trial court that Star Tribune is a good  
3 dues, tax-paying citizen of the state of Minnesota, and  
4 there's no evidence to the contrary.

5 To characterize this tax as a normal form of  
6 use tax, I respectfully submit is to totally  
7 mischaracterize --

8 QUESTION: Mr. Brown, you did seem to indicate  
9 that both the sales tax on the newspapers and this tax  
10 at issue here would be invalid. But I would suppose  
11 that you could sustain the sales tax without sustaining  
12 this tax.

13 MR. BROWN: You could, Your Honor. However,  
14 the sales tax issue is not part of this case.

15 QUESTION: That's right, that's certainly  
16 right. And, of course, in the sales tax, at least  
17 theoretically, it makes the newspaper more expensive,  
18 but supposedly you collect it from the buyer.

19 MR. BROWN: That's correct. Whereas this tax,  
20 Your Honor, comes out of the pocket of the newspaper.

21 QUESTION: You're entitled probably to pass it  
22 on. But nevertheless, the incidence, the sales tax,  
23 isn't on the press.

24 MR. BROWN: That is correct. Under  
25 Minnesota's sales tax approach, Star Tribune and other

1 sellers would be prohibited from paying the tax or  
2 absorbing it as part of their cost --

3 QUESTION: So I don't know why you wouldn't  
4 argue that even if the sales tax would be valid, this  
5 tax is invalid.

6 MR. BROWN: Well, we do argue that, Your  
7 Honor. The only reason we ever got into the sales tax  
8 issue in our brief was with great reluctance because the  
9 Minnesota Supreme Court appeared to us to endeavor to  
10 justify the constitutionality of the tax at issue with  
11 the assumption that a sales tax on the sale of  
12 newspapers would also be constitutional.

13 It is clearly not an issue before the court;  
14 the parties agree on that. And it is clearly not an  
15 issue that needs to be resolved or affected by the --

16 QUESTION: Mr. Brown, let me be sure I  
17 understand your answer to Justice Rehnquist's question.  
18 If you assume, contrary to your position, that a sales  
19 tax on newspapers would be permissible, -- uniform as to  
20 all comparable businesses -- why then is a use tax,  
21 which is less burdensome and designed to replace the  
22 sales, then why is that unconstitutional?

23 MR. BROWN: Your Honor, our position is this.

24 QUESTION: And leaving out the exemption for a  
25 moment.

1           MR. BROWN: All right. Our position is that  
2 certain forms of taxes historically have been proven to  
3 be the vehicle by which legislatures attempt to exercise  
4 control or restraint over the press. That is true of  
5 all the stamp taxes that were imposed on paper. The  
6 legislators of the 1700s were less inhibited in stating  
7 their true reasons why they imposed taxes, and the  
8 historical references make clear that the stamp taxes  
9 were imposed to restrain and control the press.

10           It is because, Your Honor, the form of the tax  
11 being placed on the only two physical components of the  
12 newspaper that creates the danger that if the power to  
13 impose such taxes is recognized, then the regulation  
14 thereafter is gone.

15           Whereas, when you're dealing with a general  
16 sales tax there is at least the comfort that the  
17 newspapers in Minnesota find themselves in bed with all  
18 of the other taxpayers with a common view that no one  
19 likes to pay taxes.

20           QUESTION: Mr. Brown, you sound like you're  
21 making an intergovernmental immunity argument.

22           MR. BROWN: I don't mean to, Your Honor.

23           QUESTION: Anyway, it's understandable,  
24 against that background.

25           MR. BROWN: It's a difficult issue when you

1 talk about a sales tax of general, non-discriminatory  
2 application and the position that the newspapers may  
3 take at some point in time in the future. I don't mean  
4 to over-emphasize the point, but I have been asked  
5 questions about it and I have to preserve the position  
6 that we maintain.

7 I'd like to, if I may, Mr. Chief Justice,  
8 reserve the time for rebuttal.

9 CHIEF JUSTICE BURGER: Very well. Mr.  
10 Kempainen.

11 ORAL ARGUMENT OF PAUL R. KEMPAINEN, Esq.

12 ON BEHALF OF THE APPELLEE

13 MR. KEMPAINEN: Mr. Chief Justice, and may it  
14 please the Court:

15 In 1971, the state of Minnesota was engaged in  
16 fashioning one of its most important social and  
17 political programs in its history. The result was a  
18 comprehensive tax and financial reform act which took up  
19 over 116 pages. Over half of this volume of the  
20 Minnesota Special Session laws for that year.

21 Enacted as part and parcel of this law and yet  
22 taking up only one-half of a page in it, was the basic  
23 use tax on paper and ink that we have here. Now, all  
24 one has to do is to read this large tax reform measure  
25 in order to understand that its basic purpose was

1 revenue raising, its basic purpose was a social program  
2 of creating more equal educational opportunities for  
3 Minnesotans.

4           The basic thrust of the 1971 law, of which the  
5 basic use tax here was a part, was to lower the overall  
6 property tax burdens in Minnesota which were very high  
7 at the time, and to make up for the subsequent loss in  
8 revenue through increasing the statewide income tax and  
9 the statewide sales and use tax, and then to  
10 redistribute that revenue back to the local governments  
11 and particularly, back to local school districts for the  
12 purpose, the avowed purpose, of equalizing educational  
13 opportunity throughout Minnesota at that time.

14           It was an important social experiment in  
15 Minnesota and it happened to be a successful one, at  
16 least in the early 1970s when it became popularly known  
17 as the Minnesota Miracle.

18           This legislative background, which we feel the  
19 appellant has given inadequate treatment to, as well as  
20 the statutory language of this tax on its face shows  
21 that Minnesota's use tax on paper and ink, the basic use  
22 tax, is purely and simply a revenue-raising measure. No  
23 other purpose either has been or can be ascribed to it  
24 under this record.

25           This history as well as the statutory language

1 also shows that Minnesota's use tax on paper and ink is  
2 an integral part of a general system of taxation, and  
3 that it is tied to the general sales and use tax rate.  
4 In 1971 it was imposed at the same sales and use tax  
5 rate, 4 percent, as all other sales and use taxes in  
6 Minnesota. And today it is still tied to that same  
7 general rate.

8               Therefore, the rate of tax upon paper and ink  
9 cannot be increased without also raising the rate upon  
10 all other businesses subject to the sales and use tax in  
11 the state.

12               I think it's also important to point out that  
13 this legislative history and the statutory language on  
14 its face shows that this tax was imposed at the lesser  
15 wholesale value of the paper and ink and not at its  
16 retail value when it's finally incorporated into the  
17 final product. Which would have been the case if a  
18 general sales tax had been imposed upon all newspapers.

19               I think the Minnesota legislature back in 1971  
20 was seeking to achieve a revenue-raising purpose and  
21 tailored its statute so as to achieve that  
22 revenue-raising --

23               . QUESTION: Mr. Attorney General, if it was a  
24 revenue-raising act, why leave out all those newspapers?

25               MR. KEMPAINEN: Your Honor, the \$100,000

1 exclusion was, admittedly, not for a revenue-raising  
2 purpose. Instead, we contend it was for another  
3 purpose, and that purpose was to establish this taxing  
4 scheme as being more equitable, taking into account the  
5 special problems dealt with by small publishers through  
6 a device, I would point, which is an exclusion that  
7 applies equally and with the same benefit to even the  
8 large publishers across the board.

9           This history, as well as the statutory  
10 language, also points out -- and especially the  
11 statutory language, in response to Justice White's  
12 question of the appellant -- is that this does apply to  
13 all publications across the board -- publications as  
14 they are defined in the Minnesota statutes.

15           When Minnesota first enacted its sales and use  
16 tax in 1967, it did not exempt all printed matter per  
17 se, even though all printed matter, obviously, is  
18 subject to First Amendment protections. Instead, it  
19 created a specific class of printed matter which it  
20 deemed to be publications, and that definition of what  
21 consists of publications is printed matter which is set  
22 out at intervals of three months or less.

23           QUESTION: Who has paid the tax? Who has ever  
24 paid this tax?

25           MR. KEMPAINEN: On this record, Your Honor, we

1 only have evidence that the newspapers have paid the tax.

2 QUESTION: Well, that's all, isn't it? Who's  
3 ever paid the tax.

4 MR. KEMPAINEN: No, not necessarily, Your  
5 Honor. And in any event --

6 QUESTION: Didn't the Minnesota Supreme Court  
7 judge this case on the basis that this was just a tax on  
8 newspapers who consumed more than \$100,000?

9 MR. KEMPAINEN: No. I would respectfully  
10 disagree, Your Honor, it did not. And I was getting to  
11 that point.

12 In the very beginning of the Supreme Court's  
13 opinion on the Appendix to the Jurisdictional Statement,  
14 A2, the State Supreme Court said, that this tax is paid  
15 by some newspapers and publications, but not all.  
16 Therefore, at the very beginning of its opinion it  
17 recognized --

18 QUESTION: You just told me that there wasn't  
19 any evidence that anybody but newspapers paid the tax.  
20 So what's the --

21 MR. KEMPAINEN: The evidence is the basic  
22 statute itself, Your Honor.

23 QUESTION: What's the evidence that other  
24 publications have paid it?

25 MR. KEMPAINEN: There was no evidence, Your

1 Honor, and we did not submit any. We did not feel it  
2 was necessary since it was on the face of the statute  
3 itself that this applied to all publications and not  
4 just to newspapers.

5 QUESTION: When Justice White asks you about  
6 evidence that other publications paid the tax, do you  
7 interpret that to mean evidence from the receipts  
8 department of the Taxation Division to the effect that  
9 they had receipts from such-and-such a taxpayer, or  
10 whether the tax is intended to cover other publications?

11 MR. KEMPAINEN: I take it that Justice White's  
12 question -- and correct me if I'm wrong, Justice White,  
13 -- is that the evidence is that particular taxpayers  
14 other than newspapers did pay this tax. Which would  
15 have been difficult --

16 QUESTION: My question was directed -- the  
17 submission is that this is a tax on newspapers.

18 MR. KEMPAINEN: The submission by the Star  
19 Tribune, Your Honor.

20 QUESTION: And no one else pays this tax. And  
21 you say that this is a tax that on the face of it, --  
22 and we must assume it's true because the Supreme Court  
23 of Minnesota recited it -- is a tax on all publications,  
24 if they consume enough paper and ink.

25 MR. KEMPAINEN: That's correct, Your Honor.

1           QUESTION: And I suppose the next question is  
2 with the exclusion of the \$100,000, who else but  
3 newspapers consumes that much paper and ink?

4           MR. KEMPAINEN: I think the example that was  
5 previously given of 3M and its advertising certainly --

6           QUESTION: That would probably be the biggest,  
7 wouldn't they?

8           QUESTION: West publishing Company certainly  
9 uses more.

10          MR. KEMPAINEN: West Publishing Company, Your  
11 Honor, does not -- their end product, their books that  
12 the West Publishing Company prints, their end product is  
13 subject to sales tax at the retail level and, therefore,  
14 is not considered a publication.

15          QUESTION: But it does use as much paper and  
16 ink as a newspaper does.

17          MR. KEMPAINEN: Oh, it certainly does, Your  
18 Honor. Probably more so.

19          QUESTION: I should think so.

20          MR. KEMPAINEN: And the paper and ink that is  
21 used by West Publishing is already being subjected --  
22 was already being subjected to the sales tax itself,  
23 because the end product, the books of West Publishing  
24 Company, were subjected to the retail sales tax. And  
25 therefore, the value of the paper and ink was being

1   taxed at that point in the commercial flow.

2                   And getting back to a point that I just made,  
3   what the legislature did here, instead of imposing this  
4   tax at the point of the retail sale which might be  
5   considered too close to actual communicative acts, the  
6   communicative act of printing and disseminating a  
7   newspaper, instead it went back a step and it tried to  
8   get away from -- as far away from the communicative act  
9   as possible by instead taxing the wholesale purchase of  
10  paper and ink by a commercial publication.

11                  QUESTION: Under Minnesota law, do you agree  
12  that the sales tax where it's imposed is passed on to  
13  the purchaser? Is that a requirement?

14                  MR. KEMPAINEN: Yes, Your Honor, it is.

15                  QUESTION: And it may not be absorbed.

16                  MR. KEMPAINEN: The sales tax may not be  
17  absorbed. There is no requirement, at least that I am  
18  aware of, Your Honor, that this use tax has to be  
19  absorbed. The use tax on paper and ink can be included  
20  and passed -- in the price of a publication passed on to  
21  the ultimate consumer.

22                  QUESTION: But there's also no requirement  
23  that it be passed on.

24                  MR. KEMPAINEN: No, Your Honor, that's up to  
25  the commercial publication in their own discretion.

1                   QUESTION: May I ask a question -- I may not  
2 have followed -- on what a publication is within the  
3 meaning of the statute. As I understood the statute,  
4 the term "publication" is defined just to include  
5 newspapers. Is that right?

6                   MR. KEMPAINEN: No, that's not correct, Your  
7 Honor. The term "publication" is any printed matter  
8 which is sent out at regular intervals of three months  
9 or less. So it would include news magazines, trade  
10 journals, serially-issued comic books -- there's a whole  
11 laundry list of publications besides just newspapers  
12 that this applies to.

13                  QUESTION: Wouldn't that encompass West?

14                  MR. KEMPAINEN: No, Your Honor, because most  
15 West books do not come out at average intervals of three  
16 months or less.

17                  QUESTION: They come out a lot faster than  
18 that, as far as I can see.

19                  (Laughter.)

20                  MR. KEMPAINEN: No. The West Book -- I  
21 believe you're talking about the Federal 2nd and so  
22 forth, the Supreme Court Reporter. That's not  
23 considered -- that's considered a one-of-a-kind  
24 edition. Each one of those volumes is considered a  
25 one-of-a-kind edition. So when it comes out, it's

1 considered a printing, a single printing, each volume.

2 QUESTION: And besides, isn't it subject to  
3 the sales tax?

4 MR. KEMPAINEN: Yes, it is, Your Honor.

5 QUESTION: Well, the term "publication" I  
6 thought was defined at A77 of the -- I guess I just must  
7 have just misread it. I thought it just covered  
8 newspapers and supplements and enclosures with the  
9 newspaper.

10 MR. KEMPAINEN: I think a greater definition,  
11 Your Honor, perhaps in less formal statutory language  
12 can be found in the Minnesota regulation dealing with  
13 the statute, which is found in JA 30, the Joint  
14 Appendix. And there it goes down the laundry list of  
15 what is included in a publication.

16 QUESTION: Does that include any publication  
17 that is subject to a sales tax on the end result?

18 MR. KEMPAINEN: No, it does not, Your Honor.  
19 In order to perhaps put this in greater perspective in  
20 case there's any confusion on this point, in 1967,  
21 Minnesota carved out publications, which was a broad  
22 class but nevertheless, less narrow than "all printed  
23 matter." Those publications which are published at  
24 average intervals of three months or less. There was no  
25 sales tax on the retail sale of those publications.

1           Everything else was subject to sales tax. And  
2 therefore, -- and what Minnesota did in 1971 when it was  
3 searching for additional revenue, instead of eliminating  
4 the total exemption from the sales tax for publications,  
5 it instead went further back in the commercial flow of  
6 this transaction and instead imposed this use tax which  
7 we have here on the wholesale value of the paper and  
8 ink. Which the record shows only takes up between 20  
9 and 25 percent of the final product, the final  
10 newspaper's value.

11           QUESTION: Of course, that really is  
12 irrelevant, isn't it.

13           MR. KEMPAINEN: Oh, yes.

14           QUESTION: If your position is right, you  
15 could have imposed the full 4 percent.

16           MR. KEMPAINEN: Well, that's correct, Your  
17 Honor. We take the position, although we feel it's not  
18 an issue here, that Minnesota could have imposed its  
19 full sales tax on the publications. And the fact that it  
20 did not and instead imposed this use tax on paper and  
21 ink I think is probably one of the things that got the  
22 state of Minnesota into a little bit of trouble here.  
23 It was intending to be solicitous of First Amendment  
24 rights and instead it got into this litigation.

25           And the next step two years further down the

1 line, when the \$100,000 exclusion came into effect, that  
2 again was a point where the legislature was attempting  
3 to be solicitous of First Amendment rights, especially  
4 the First Amendment rights of small publications who  
5 would generally have less of an ability to pay, who  
6 impose fewer social costs upon society and therefore,  
7 the legislature could reasonably conclude that it would  
8 be more inequitable to have them pay this tax, the full  
9 measure, than it would be for a larger publication.

10 But it did not do so through a technique which  
11 simply exempted the small publications and then left the  
12 full measure of the tax on the larger newspapers such as  
13 the Star and Tribune. Instead, it did so through --

14 QUESTION: Has the legislature made any  
15 changes since this litigation began?

16 MR. KEMPAINEN: No, it hasn't, Your Honor.  
17 The \$100,000 exclusion has remained the same. And the  
18 \$100,000 exclusion applies equally and with the same  
19 benefit to the Star and Tribune that it does to the  
20 small publications.

21 The effect of the \$100,000 exclusion was to  
22 give the Star and Tribune an \$8000 lessening of a tax  
23 bill, a credit on its tax bill. And we simply fail to  
24 see how that, in the first place, can be considered any  
25 kind of a penalty --

1           QUESTION: Mr. Attorney General, suppose  
2 instead of an \$8000 credit or a \$4000 credit, you gave  
3 them, say, a \$25,000 credit. Then there'd be only two  
4 or three papers that would pay the tax.

5           MR. KEMPAINEN: Well, the --

6           QUESTION: Would that be constitutional?

7           MR. KEMPAINEN: I think the decisions of this  
8 Court, Your Honor, I don't think necessarily take it  
9 that on a general law that would otherwise be valid  
10 imposing valid classifications, is necessarily  
11 unconstitutional because it applies to only one person.

12          QUESTION: In Illinois they have a practice of  
13 exempting all counties under 500,000 from a lot, which  
14 is a way of legislating about Chicago. And I suppose  
15 you could do the same sort of thing here with an  
16 exemption of, say, \$35,000. It's perfectly neutral on  
17 its face, but people wouldn't have much difficulty  
18 figuring out who would have to pay the tax.

19          MR. KEMPAINEN: Well, that's true, Your Honor,  
20 but that happens in a lot of cases. In the state of  
21 Minnesota, to take an example like you had from  
22 Illinois, we had a tax on taconite tailings that were  
23 dumped into bodies of water. Well, the only taconite  
24 plant in the state of Minnesota that did that was  
25 Reserve Mining Company. Reserve Mining challenged that,

1 also, on equal protection grounds and lost.

2 QUESTION: Well, what about my question? Do  
3 you think if you did raise the exemption as I suggested,  
4 it would still be constitutional?

5 MR. KEMPAINEN: I'm sorry, I didn't quite  
6 understand.

7 QUESTION: The question is if the exemption or  
8 the credit, whatever you call it, instead of being \$4000  
9 was \$35,000, so the only two left were the papers in  
10 Minneapolis and St. Paul.

11 MR. KEMPAINEN: Yes, Your Honor, I think it  
12 would still be constitutional. As long as it was  
13 non-content related and as long as there was no evidence  
14 of suppressive legislative intent, which there is none in  
15 this case.

16 And my point about being non-content related I  
17 think brings me to the uncontested fact in this case  
18 that Minnesota's use tax on paper and ink is non-content  
19 related. It applies equally and across the board to  
20 whoever comes within its act, and it makes no difference  
21 what the subject matter of the publication may be.

22 QUESTION: Do you think the court in Grosjean  
23 would have reached the same result absent Huey Long's  
24 activities in Louisiana at that time?

25 MR. KEMPAINEN: I think assuming -- I think

1 the result in Grosjean, Your Honor, was a result of many  
2 factors. One of the factors was the legislative intent  
3 which was -- and the suppressive intent was -- evidence  
4 of that was overwhelming in the Grosjean case. And this  
5 Court mentioned it in its opinion. It mentioned it  
6 twice, that it was that purpose, it was that legislative  
7 intent which had a bearing on its decision.

8           Perhaps, though, the main part of the decision  
9 was the fact that the legislative enactment in the  
10 Grosjean case, the Louisiana statute there on its face  
11 was discriminatory and was directly tied to a level of  
12 circulation which made it entirely too close to the  
13 British taxes on knowledge.

14           QUESTION: Do you think this Court has to look  
15 at the potential for abuse or control of the press in  
16 the tax scheme in determining its validity?

17           MR. KEMPAINEN: I think that's true to a  
18 certain extent, Your Honor. But I think it's also well  
19 to point out that in a couple of cases in the past which  
20 upheld otherwise valid general schemes on regulation --  
21 and I'm speaking now about Associated Press versus  
22 National Labor Relations Board and I believe the other  
23 one was Associated Press versus United States. The  
24 dissents in those cases also looked at future impact.  
25 And they were concerned and they said so in their

1 dissents that application of the National Labor  
2 Relations Act and application of the Sherman Antitrust  
3 Act to newspapers would open up a small crack that may  
4 not seem like much now, but then it would widen out and  
5 pretty soon we wouldn't have any First Amendment left  
6 whatsoever.

7           Of course, here we are over four decades later  
8 and the National Labor Relations Act still applies to  
9 newspapers and the First Amendment is just as strong as  
10 ever. I think you just have to -- it's a consideration,  
11 but I don't think it's all that important a  
12 consideration. And especially in a case such as we have  
13 here where there is absolutely no evidence whatsoever  
14 that the legislature had any sort of suppressive intent  
15 or was intended or out to get newspapers, or even big  
16 newspapers.

17           QUESTION: Of course, in your state you have  
18 no formal legislative history ever, do you?

19           MR. KEMPAINEN: That's correct, Your Honor.  
20 The state of Minnesota does not make a practice, like  
21 Congress does, of keeping a legislative history on any  
22 formal basis.

23           QUESTION: It would be helpful sometimes if  
24 they did, I think.

25           MR. KEMPAINEN: That's true, Your Honor, if

1 they had the money to do so. But I think state  
2 legislatures, unlike Congress, don't have the vast sums  
3 at their availability and many states, Minnesota perhaps  
4 and New Hampshire in particular I would think, the  
5 general politics of the state just would make it  
6 impossible for a legislature to spend the amount of  
7 money that it would take to build up a legislative  
8 record on every single piece of legislation that came  
9 through it.

10 QUESTION: Some states do.

11 MR. KEMPAINEN: Some states do, Your Honor.  
12 The larger ones, in particular.

13 QUESTION: Why would it be particularly  
14 difficult for New Hampshire?

15 MR. KEMPAINEN: Oh, I just mentioned that,  
16 Your Honor, because they're very much -- I was reading  
17 an article recently about --

18 QUESTION: Their assembly has 400 members.

19 MR. KEMPAINEN: Yes, it's a large assembly,  
20 Your Honor, and they don't like taxes in New Hampshire.  
21 There's no income tax or sales tax in New Hampshire.  
22 And the reason I mentioned that, Your Honor, is I read  
23 an article about I believe some New Hampshire politician  
24 failed to take the traditional "no tax" pledge and lost  
25 the election.

1           Moving on to the Grosjean case in particular,  
2 I think the only real case that the Star Tribune has  
3 with regard to Grosjean is on this tax on knowledge  
4 issue. And yet, Minnesota's tax is simply not like the  
5 British stamp tax, it is not like the British tax on  
6 advertisements, which were the only two taxes on  
7 knowledge that the Grosjean court mentioned in its  
8 opinion.

9           The Star Tribune virtually concedes as much in  
10 its own brief, that it was not a stamp tax. Instead, it  
11 tries to bring it into the same category as the British  
12 tax on paper.

13           QUESTION: I don't understand your position to  
14 be -- I understand the position to be that in England,  
15 the first set of taxes were very innocuous and they went  
16 on and on and on. And eventually, they went too far.  
17 And I understand the position to be that if they let  
18 down and let you start this, in years to come it might  
19 get worse. Isn't that more what their argument is?

20           MR. KEMPAINEN: That may be the Star Tribune's  
21 argument, that's true, Your Honor, but I don't believe  
22 that the history of the taxes on knowledge would support  
23 that.

24           QUESTION: I only said I thought that was  
25 their position.

1                   MR. KEMPAINEN: Oh, yes, Your Honor. In that  
2 case, it might be. But the history of the taxes on  
3 knowledge does not support that. All I need do is quote  
4 two passages from the Grosjean opinion itself, which  
5 went into a very great amount of detail with regard to  
6 the British taxes on knowledge.

7                   In the Grosjean opinion on page 246 it says,  
8 and I quote, "The main purpose of these taxes was to  
9 suppress the publications of comments and criticisms  
10 objectionable to the Crown, does not admit of doubt."  
11 Later on in the same page this Court said, and I quote,  
12 that "The taxes had and were intended to have the effect  
13 of curtailing the circulation of newspapers, and  
14 particularly, the cheaper ones whose readers were  
15 generally found among the masses of people went almost  
16 without question, even on the part of those who defended  
17 the Act."

18                  This is this Court talking about the history  
19 of the British stamp taxes and the British taxes on  
20 knowledge.

21                  And it may be true that insofar as British  
22 history is concerned, their import duty on paper -- or  
23 rather, duty on paper -- was used with that intention in  
24 mind, and also coupled with the fact that the British  
25 taxes on knowledge granted notoriously unfettered

1 discretion to the British administrations in the  
2 collection of those taxes, thereby making them even  
3 easier tools to use to suppress their political  
4 opponents.

5           Those two facts together made the British  
6 taxes on knowledge odious to American experience. Of  
7 course, in the case of Minnesota's use tax on paper and  
8 ink, neither one of those facts are present here. There  
9 is no intent to suppress. Revenue raising was not given  
10 just lip service in Minnesota; it was the basic reason  
11 for this, and it was part and parcel of the Minnesota  
12 Miracle Act which was passed back in 1971. And, of  
13 course, there is no unfettered discretion in the  
14 collection of the Minnesota use tax, as well.

15           QUESTION: But let me just explore your  
16 argument for a moment. Supposing that in 1974, when you  
17 passed the exemption, there was evidence that there was  
18 a change in control of the legislature. I don't happen  
19 to know anything about Minnesota politics, but suppose  
20 all the rural districts where these smaller newspapers  
21 are mostly published happened to elect people, and they  
22 then passed an exemption for the newspapers that  
23 supported them, and that could be shown.

24           Would that make it a different case?

25           MR. KEMPAINEN: No, Your Honor. Although it

1 would make it a different case if, as Your Honor says,  
2 this was an exemption. But it's not an exemption; it's  
3 an exclusion.

4 QUESTION: Then go back to 71. Suppose the  
5 original tax, it could be shown that the governor and  
6 the majority of the legislature were opposed by the  
7 principal newspapers who would bear the burden of the  
8 tax, and in their campaign they explicitly said, we  
9 think the newspapers ought to pay their fair share of  
10 the public burden and all the rest of it. And then  
11 there was a political debate on the issue. Would that  
12 make a difference?

13 MR. KEMPAINEN: I would suggest, Your Honor,  
14 that this Court could use the Grosjean decision and  
15 invalidate that tax, then.

16 QUESTION: So we have to get into the politics  
17 of the particular state to know whether a tax of this  
18 kind is bad or not, then.

19 MR. KEMPAINEN: At least the legislative  
20 history; not necessarily the politics, Your Honor.

21 Up until this point, we've talked primarily  
22 about the issue as it is framed in terms of a violation  
23 of the First Amendment per se, and we really haven't  
24 talked too much about the equal protection issues. I  
25 would like to take the remainder of my time to talk

1 about the equal protection issues as they arise here.

2 I would like to -- Yes, Your Honor?

3 QUESTION: Could I ask just one other question  
4 about this motive problem. Assume we had a totally  
5 non-discriminatory sales tax; that this tax tha was put  
6 into effect was one that just treated newspapers exactly  
7 like all other businesses, so there was no singling  
8 out. But it was also clear that the reason for doing it  
9 was that the legislature didn't like the dominant paper  
10 in the state. Would that be bad, too? How controlling  
11 is --

12 MR. KEMPAINEN: You mean they passed a general  
13 sales tax on all businesses?

14 QUESTION: Right. Absolutely not  
15 discriminating, but for a political motive. When is  
16 motive controlling? I just wonder.

17 MR. KEMPAINEN: Well, I think that would be a  
18 closer case, Your Honor, and I can only say that it's  
19 not the case here. And I would hesitate to speculate on  
20 what would be the outcome of that case.

21 With regard to the equal protection issue,  
22 this was given some space in the briefs, and I think  
23 rightly so. I'd like to mention that our primary  
24 position here, as it has been throughout this  
25 litigation, is that the anti-rational basis standard of

1 review is the correct standard of review here to use.  
2 This is because the thing being taxed, the wholesale  
3 commercial purchase of paper and ink, is simply not a  
4 fundamental right so closely connected to actual  
5 communicative acts that it requires the strict scrutiny  
6 standard of review.

7           There's certainly no more of a fundamental  
8 right than the Star and Tribune's purchase of gasoline  
9 or tires for its delivery trucks, which are subject to  
10 the excise tax, or its purchase of desks and reporters,  
11 desks and typewriters for its reporters, which has  
12 always been subject to sales and use taxation in  
13 Minnesota in any event. Any business that buys desks  
14 and typewriters for its people, for its employees, has  
15 to pay sales tax on those desks and typewriters.

16           This is simply an incidental burden, an  
17 incidental item of overhead, just like those other  
18 incidental items, that any commercial business has to  
19 absorb in the state of Minnesota and, indeed, in all  
20 other states.

21           Therefore, we feel that it's sufficiently  
22 remote from actual communicative acts so that where we  
23 don't deny that it may have some effect upon First  
24 Amendment interests, it is not a fundamental effect  
25 invoking strict scrutiny.

1           But having said that, I think I still want to  
2 go on and talk about how this case can meet the strict  
3 scrutiny standard of review in any event, because if it  
4 meets strict scrutiny, it certainly meets the  
5 anti-rational basis standard.

6           All the strict scrutiny standard of review  
7 requires is that there be a legitimate and important  
8 government purpose served by a statute which is  
9 sufficiently tailored so as to achieve that purpose  
10 without unduly restricting First Amendment interests and  
11 actual communicative acts.

12           Now, the original and basic use tax in this  
13 case is so tailored. It serves -- it was enacted in  
14 1971 to serve an important and fundamental governmental  
15 interest, which is revenue raising for an important  
16 social program, and it is sufficiently tailored so as to  
17 get as far away from the actual communicative act of  
18 printing and publishing a newspaper as possible, and at  
19 the same time achieve its revenue-raising purpose by  
20 taxing the wholesale purchase of paper and ink.

21           As for the \$100,000 exclusion, of course, our  
22 first position there is that it's a benefit anyway, and  
23 it's a benefit that applies equally and across the board  
24 to all publications. In fact, the Star and Tribune, by  
25 reason of the fact that during the years in question it

1 had two editions, the morning edition and the evening  
2 edition, it received two exclusions, getting a benefit  
3 of \$8,000 off its tax bill.

4 QUESTION: At what level does the sales tax  
5 normally cut in -- a penny for every dime, or is it -- ?

6 MR. KEMPAINEN: I don't recall the actual  
7 level now in Minnesota, Your Honor, but --

8 QUESTION: Do you think you pay a sales tax if  
9 you buy something for 20 cents?

10 MR. KEMPAINEN: It was at 9 cents or -- . It  
11 was for anything less than 9 cents you did not have to  
12 pay a sales tax. And I'm not sure if that's still  
13 correct but there was a level at a small level like that  
14 where it cuts in.

15 QUESTION: But do you think -- you think the  
16 newspapers are normally sold at a level that's above the  
17 cutoff.

18 MR. KEMPAINEN: I know they are, Your Honor.  
19 I buy mine all the time at 25 cents a copy.

20 QUESTION: And anytime you buy something for  
21 25 cents, unless it's exempt, you pay a sale tax.

22 MR. KEMPAINEN: That's correct, Your Honor.

23 We feel that there was a compelling reason, in  
24 any event, for the \$100,000 exclusion. Even assuming  
25 that it was discriminatory and was not -- and is subject

1 to strict scrutiny. That compelling reason being that  
2 there was an equitable -- that a need for an equitable  
3 system of taxation that took into account the special  
4 problems of small newspapers. And the legislature  
5 achieved that by a tailored technique; namely, an  
6 exclusion rather than an exemption. An exclusion, a tax  
7 credit, if you will, that was given equally and across  
8 the board to all papers.

9 QUESTION: What's your -- that's easy to talk  
10 about the special needs of small newspapers, but what is  
11 that?

12 MR. KEMPAINEN: A small newspaper, Your Honor?

13 QUESTION: Yes. What's the special need of a  
14 small newspaper that prompted the exemption?

15 MR. KEMPAINEN: Most small newspapers, Your  
16 Honor, are --

17 QUESTION: You mean mainly, they couldn't  
18 afford it?

19 MR. KEMPAINEN: Yes, Your Honor. They had a  
20 hard time paying this, they had less of an ability to  
21 pay, they were mainly located in rural areas, had a  
22 smaller circulation and, therefore, had less chance for  
23 advertising revenues. There are any number of reasons  
24 that the legislature could have drawn on in order to  
25 give a special --

1               QUESTION: It was purely a financial break to  
2 them.

3               MR. KEMPAINEN: Yes, Your Honor. But it was  
4 also a financial break -- I wish to emphasize -- that  
5 was equally applicable to the large newspapers and the  
6 large publications.

7               In summary, what we have here is a simple  
8 revenue-raising statute. It's non-content related, it's  
9 not a license tax, it's not tied directly to  
10 circulation, and it was not imposed with any improper  
11 purpose, least of all a suppressive one. Whatever  
12 classifications there are in that statute, they were  
13 imposed with a view towards benefiting First Amendment  
14 interests and for being solicitous toward them and not  
15 with a view towards suppressing First Amendment  
16 interests.

17              Whether the anti-rational basis standard of  
18 review is used under equal protection, we contend that  
19 it should be the correct standard, or whether the strict  
20 scrutiny standard of review is used, as the Minnesota  
21 Supreme Court did below, this statute meets the  
22 requirements of equal protection.

23              It is also not violative of the Grosjean case  
24 or any other principles under the First Amendment per  
25 se. Accordingly, we feel that the law is constitutional

1 and respectfully ask that the decision of the Minnesota  
2 Supreme Court be affirmed.

3 CHIEF JUSTICE BURGER: Do you have anything  
4 further, Mr. Brown? You have two minutes remaining, and  
5 we'll complete the case before lunch.

6 ORAL ARGUMENT OF LAWRENCE C. BROWN, ESQ.

7 ON BEHALF OF THE APPELLANT -- Rebuttal

8 MR. BROWN: Thank you, Mr. Chief Justice.

9 Justice O'Connor, you ask Mr. Kempainen  
10 whether there have been any changes in the Minnesota  
11 sales and use tax scheme since this litigation  
12 commenced. The legislative session which just ended a  
13 few weeks ago increased the basic sales tax rate in  
14 Minnesota to 6 percent on all articles that sell for  
15 more than 9 cents. They left the sales tax rate on farm  
16 machinery at 4 percent, and the sales and use tax on  
17 motor vehicles at 5 percent.

18 I point this out simply to note that there is  
19 no comfort in the state's argument of uniform rate,  
20 because the legislature has now broken it down and rates  
21 are no longer uniform.

22 The other point I'd like to make is Mr.  
23 Kempainen stated that you must find bad motive in order  
24 to invalidate the tax at issue, and what you do is you  
25 look to legislative history in order to establish bad

1 motive. Well, we don't think bad motive is material to  
2 a First Amendment analysis, but the state of Minnesota  
3 here has created a situation where we have no  
4 legislative history.

5           If Mr. Kempainen's approach is correct, what  
6 it means is that by not creating legislative history, a  
7 state can insulate a tax on First Amendment activity,  
8 and if bad motive is a requisite of proof you can never  
9 prove it; therefore, you can never challenge it.

10           We were invited to come here --

11           QUESTION: That isn't really quite right. We  
12 did have a case from Minnesota, the Fairmont Creamery  
13 case -- that's not the name of it --

14           MR. BROWN: The Cloverleaf case.

15           QUESTION: Yes. They found -- there was a  
16 trial court finding on the motive there.

17           MR. BROWN: Your Honor, what that proves is  
18 when the Minnesota legislature wants this Court to have  
19 legislative history, it knows how to create it.

20           I would close only with the observation that  
21 we were invited to come here, as the transcript of oral  
22 argument reflects, by the Chief Justice of the Minnesota  
23 Supreme Court, and in so doing, we come here seeking  
24 comfort under Justice Holmes' admonition that the power  
25 to tax is not the power to destroy, while this Court

1 sits. We pray that you reverse the judgment appeal from  
2 him.

3 CHIEF JUSTICE BURGER: Thank you, gentlemen,  
4 the case is submitted.

5 (Whereupon, at 12:10 p.m., the above-entitled  
6 case was submitted.)

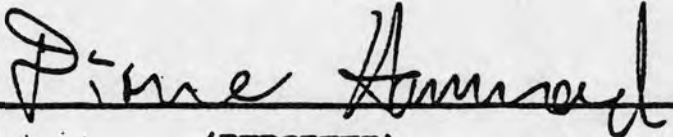
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:  
MINNEAPOLIS STAR TRIBUNE COMPANY, Appellant v. MINNESOTA  
COMMISISONER OF REVENUE # 81-1839

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsaker", written over a horizontal line.

(REPORTER)